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No. 85-423 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1985

CARL WESLEY THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the district court abused its discretion by refusing to grant a severance and that it committed plain error by failing to reconsider its ruling on the admissibility of co-conspirator statements at the close of all of the evidence.

1. Following a jury trial in the United States District Court for the Western District of Missouri, petitioner was convicted on six counts of interstate transportation of stolen property, in violation of 18 U.S.C. 2314, three counts of interstate travel in aid of a racketeering enterprise, in violation of 18 U.S.C. 1952, and one count of conspiracy to commit these offenses, in violation of 18 U.S.C. 371. He was sentenced to a total of 15 years' imprisonment, fined

$90,000, and ordered to make restitution of an additional $90,000. The court of appeals affirmed (Pet. App. A1-A43).[1]

The evidence at trial, the sufficiency of which is not in dispute, is summarized in the opinion of the court of appeals (Pet. App. A4-A7). Briefly, it showed that petitioner and others conspired to gain control of the Tropicana casino in Las Vegas, Nevada in order to "skim" money by removing cash receipts before they were recorded in the casino's books. Co-conspirator Joseph Agosto met in January 1975 with Nick Civella and petitioner's co-defendants Carl DeLuna and Carl Civella to plan Agosto's clandestine infiltration of the casino. Later that year, these men "decided to use [petitioner] to take charge of the skimming at the Tropicana" (*id.* at A5). Petitioner recommended the hiring of a casino manager who, with an assistant, "were to do the actual skimming under [petitioner's] supervision" (*id.* at A6). By the middle of 1978, over $40,000 per month was being skimmed from the casino. When Agosto and the Civellas suspected that the manager was also skimming on his own account, they instructed petitioner to "do a study of the Tropicana to determine if unauthorized skimming was occurring" (*ibid.*). Later in 1978, petitioner met with Agosto, DeLuna, and the Civellas to discuss more efficient means of skimming (*id.* at A7). In February 1979, $80,000 in skimmed cash was transported from Nevada to Missouri (*ibid.*). Petitioner admitted in a recorded conversation "that he had been involved in skimming at many casinos in Las Vegas for many years" (*id.* at A23).

2. The court of appeals affirmed (Pet. App. A1-A43). Noting that petitioner and his co-defendants were properly joined for trial under Fed. R. Crim. P. 8(b) (*id.* at A31), the

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[1]Petitioner's co-defendants Carl DeLuna, Carl Civella, Charles Moretina, and Anthony Chiavola, Sr., were each convicted on the conspiracy count and various substantive counts. Co-defendant Peter Tamburello was acquitted.

court of appeals held that the district court did not abuse its discretion in refusing to grant petitioner a severance under Fed. R. Crim. P. 14.[2] After "carefully review[ing] the record," the court of appeals rejected petitioner's argument that a severance was required so that he could obtain the testimony of co-defendant Carl Civella, concluding that a severance would have been of little value because Civella's "testimony would have been subject to substantial damaging impeachment" (*id.* at A34). The court similarly rejected petitioner's contention that he was precluded from testifying on his own behalf at the joint trial out of a fear for his safety, noting that the risk have would been substantially the same if he had testified at a separate trial (*id.* at A35). Finally, the court of appeals upheld the admission at trial of statements of petitioner's co-conspirators under Fed. R. Evid. 801(d)(2)(E) on the ground that the district court's finding that the statements were made in furtherance of the conpsiracy was not clearly erroneous (*id.* at A13).

3. Petitioner argues that the district court abused its discretion by refusing to grant him a severance so that he could be tried separately from his four co-defendants.

a. Petitioner contends first (Pet. 8-18) that a severance was required so that he could have the benefit of the testimony of co-defendant Carl Civella, who did not take the stand at the joint trial. The court of appeals in this case applied the same standard consistently set forth by other courts of appeals, upholding the denial of a severance where a co-defendant's testimony would be subject to substantial impeachment. See, *e.g.*, *United States* v. *McConnell*, 749

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[2]Fed. R. Crim. P. 14 provides in pertinent part that "[i]f it appears that a defendant * * * is prejudiced by a joinder of offenses or of defendants * * *, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

F.2d 1441, 1445 (10th Cir. 1984); *United States* v. *Drougas*, 748 F.2d 8, 19 (1st Cir. 1984); *United States* v. *Parodi*, 703 F.2d 768, 779 (4th Cir. 1983); *United States* v. *Provenzano*, 688 F.2d 194, 199 (3d Cir.), cert. denied, 459 U.S. 1071 (1982). None of the cases cited by petitioner (Pet. 12-13 n.3) conflicts with this settled rule.[3] The court of appeals' fact-bound conclusion that there was no abuse of discretion in the denial of a severance here in light of the extent to which Carl Civella's testimony would have been subject to impeachment on the basis of a tape recording of petitioner's own statements, written notes, and the testimony of government witnesses (see Pet. App. A13, A17 n.4, A23, A34) does not warrant review by this Court.

b. Petitioner also argues (Pet. 18-25) that a severance was required because he was precluded from testifying at the joint trial out of fear for his safety. This claim is meritless. In support of his contention in the district court, petitioner submitted two affidavits from his attorneys. These were placed under seal, and the government has never had

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[3]Petitioner cites no case in which the denial of a motion to sever was held to be an abuse of discretion where the co-defendant's proffered testimony was subject to substantial impeachment. *United States* v. *Khan*, 728 F.2d 676, 679 (5th Cir. 1984), *United States* v. *Little*, 753 F.2d 1420, 1446 (9th Cir. 1984), and *United States* v. *Johnson*, 713 F.2d 633, 642 (11th Cir. 1983), cert. denied, 465 U.S. 1081 (1984), all recognized the relevance of the credibility of the proffered testimony in reviewing rulings on motions to sever. *United States* v. *Whitley*, 734 F.2d 1129, 1139 (6th Cir. 1984), and *United States* v. *Oxford*, 735 F.2d 276, 280-281 (7th Cir. 1984), upheld denials of severance motions on other bases without discussion of the question presented here. *United States* v. *Seifert*, 648 F.2d 557, 563-564 (9th Cir. 1980), reversed the denial of a severance motion where no question was raised as to the credibility of the co-defendant's testimony. Finally, petitioner quotes (Pet. 13-14) *United States* v. *McConnell*, *supra*, out of context. The court in that case expressly recognized (749 F.2d at 1445) that the likelihood of impeachment has consistently been taken into account by the courts of appeals in reviewing motions to sever on the ground that petitioner asserts.

access to them. At an in camera hearing, we acknowledged that there was some danger to petitioner from persons in Chicago who were not his co-defendants but observed that these persons had no interest in whether petitioner obtained a severance, so that the threat to him would be substantially the same whether he testified at a joint trial or at a separate one (I Tr. 16-18). The district court found after reviewing the sealed affidavits that petitioner's fears were subjective (I Tr. 14). The court of appeals, which also had access to the affidavits, upheld the district court's exercise of discretion (Pet. App. A35). The petition provides no explanation of how a severance could have protected petitioner from any significant threat to his safety arising from the content of testimony he allegedly would give. There is accordingly no reason for further review.

4. Finally, petitioner contends (Pet. 25-29) that the district court erred by failing to reconsider after the close of all of the evidence its ruling, made when the government rested, that certain statements were admissible under the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E). Petitioner has waived this claim by failing to raise it in either the district court or the court of appeals. See, *e.g.*, *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). Moreover, the rule in the Eighth Circuit is precisely the one advanced by petitioner, requiring an ultimate determination of admissibility "at the conclusion of all the evidence." *United States* v. *Bell*, 573 F.2d 1040, 1044 (1978). Finally, the court of appeals, on the basis of its review of the entire record, sustained the district court's factual findings supporting the admission of the statements (Pet. App. A13-A14). The district court's harmless departure from established circuit precedent thus does not warrant this Court's review.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

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